

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: BAIR HUGGER FORCED AIR MDL No.: 15-md-02666 (JNE/FLN)
WARMING PRODUCT LIABILITY
LITIGATION

This Document Relates To:

PATRICK UPTON,

Plaintiff,

Civil Action No.: 16-CV-02374-JNE-FLN

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

NOW COMES Plaintiff, Patrick Upton, identified in Defendants' Motion to Dismiss for Failure to Comply with Pretrial Order No. 14 [Dkt. 637], and by and through undersigned counsel submits this, his Response to Defendants' Motion to Dismiss, and would respectively show the Court the following:

1. In July of 2015, Mr. Patrick Upton contacted undersigned counsel regarding an infection and subsequent treatment that he experienced due to the use of a Bair Hugger patient warming device during an orthopedic surgery.
2. Counsel worked to obtain medical records and billing records to move forward with the case. Those records indicate that a Bair Hugger device was used during the original surgery.
3. On July 8, 2016, counsel filed the current action to comply with what was identified as the applicable statute of limitations deadline for the relevant claim.

4. A phone call was placed to Mr. Upton's residence on November 7, 2016 regarding the Plaintiff Fact Sheet. Mrs. Donna Upton answered and stated that her husband had passed away recently. She expressed an interest in continuing the case and stated that she would send in the necessary paperwork to move forward.
5. Following the last phone conversation with Mrs. Donna Upton on November 7, 2016, phone calls by Kennedy Hodges staff on the following dates went unanswered, and were not returned:

- November 17, 2016
- November 29, 2016
- December 5, 2016
- December 8, 2016
- March 14, 2017
- March 20, 2017
- May 1, 2017
- May 10, 2017
- May 17, 2017
- May 24, 2017
- May 31, 2017
- June 9, 2017
- June 14, 2017
- June 28, 2017

- July 6, 2017
- July 14, 2017
- July 21, 2017
- July 31, 2017
- August 8, 2017

6. Additionally, letters were sent to Mrs. Upton on the following dates:

- November 10, 2016
- December 13, 2016
- December 21, 2016
- January 22, 2017
- April 19, 2017
- May 10, 2017
- June 14, 2017
- July 21, 2017
- August 8, 2017

7. Unfortunately, despite her earlier request to continue the case, Counsel has still not received a Plaintiff Fact Sheet questionnaire from Mrs. Upton.

8. As a result, Counsel has not been able to obtain the necessary information to complete the Plaintiff Fact Sheet for this claim.

Accordingly, undersigned counsel requests that the current action not be dismissed with prejudice and that Mrs. Upton be given a reasonable amount of time to contact counsel

to provide the necessary information to cure any alleged deficiencies with the Plaintiff Fact Sheet and to obtain the necessary probate paperwork to continue the case.

Dated: August 10, 2017

KENNEDY HODGES, LLP

By: /s/ David W. Hodges
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that on August 10, 2017 a copy of the forgoing instrument was served on all parties via the Court's electronic filing system.

By: /s/ David W. Hodges
David W. Hodges